LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 929

JAY LEE GIBSON, *Petitioner*

v.

L. D. JOHNSON and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas

HARRY D. MOORELAND
1200 Atlas Building
Tulsa, Oklahoma

ERNEST L. SAMPLE
906 Goodhue Building
Beaumont, Texas

Attorneys for the Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

SUBJECT INDEX

	Page
Opinion of the Court Below	1
Statement of Grounds on Which Jurisdiction of this Court is Invoked	2
Questions Presented	3
Statutes Involved	4
Statement of Material Facts	4
Reasons for Granting the Writ	6
Conclusion	12
Certificate of Service	13
Appendix A	15
Appendix B	26
Appendix C	27
Appendix D	28
Appendix E	30
Appendix F	44
Appendix G	51
Appendix H	53
Appendix I	54
Appendix J	56
Appendix K	61

LIST OF AUTHORITIES

CASES	Page
Hodges v. Atlantic Coast Line Railroad Company (5th Cir. 1966) 363 F.2d 534	9, 10
Jones v. Central of Georgia (5th Cir. 1964) 331 F.2d 649	9
Thompson, Trustee, v. Gibson, 335 U.S. 18, 78 S.Ct. 2, 2 L.Ed.2d 1	5, 10
Vaca v. Sipes, ____ U.S. ____, 17 L.Ed.2d 842, 87 S.Ct. ____ (Case #114, decided February 27, 1967)	7, 8, 9, 11, 12

STATUTES	
28 U. S. Code Sec. 1257(3)	2
29 U. S. Code Sec. 185(b)	2, 4, 7, 8
45 U. S. Code Sec. 153	3, 4
45 U. S. Code Sec. 58	3, 4, 5, 11

IN THE

Supreme Court of the United States

October Term, 1967

No._____

JAY LEE GIBSON, *Petitioner*

v.

L. D. JOHNSON and BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Respondents*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas

---

To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, the highest court of the State of Texas in which a decision in this case could be had. In this behalf, Petitioner shows unto the Court:

OPINION OF THE COURT BELOW

The opinion of the Honorable Court of Civil Appeals appears at 414 S.W.2d 235, and is shown in Appendix A.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is based upon the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257 (3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties, or statutes of, or commission held or authority exercised under, the United States.

The asserted right lies under an Act of Congress of June 23, 1947, c. 120, Title III, Sec. 301, 61 Stat. 156, Title 29, U. S. Code, Sec. 185 (b). Respondent Brotherhood is a "Labor Organization representing employees in an industry affecting commerce" as defined in Title 29, Sec. 152 (5), U. S. Code, 61 Stat. 137. This asserted right arises out of alleged misfeasance in the handling of a grievance under provisions of Sec. 153, Title 45, U. S. Code, 44 Stat. 578; 48 Stat. 1189.

Summary judgment adverse to Petitioner was entered by the District Court of Anderson County, Texas, on the 31st day of March, 1966 (Appendix D) and timely appeal was filed in the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler on May 20, 1966. The opinion of that Court affirming the adverse judgment is dated and filed March 30, 1967.

Motion for Rehearing filed by Petitioner April 12, 1967, was overruled May 4, 1967, and he filed a timely Application for Writ of Error with the Supreme Court of

Texas May 29, 1967, and the same was refused July 26, 1967. Motion for Rehearing, filed August 9, 1967, was overruled October 4, 1967, thus closing the last available Court in the State of Texas to this Petitioner.

Thus the Court of Civil Appeals was the highest State Court in which a decision could be had in this case, and the Petitioner seeks review of the action of that Court, March 30, 1967, affirming the summary judgment adverse to Petitioner.

QUESTIONS PRESENTED

(1) Whether an adverse ruling by the National Railway Adjustment Board under Sec. 153, Title 45, U. S. Code, estops Petitioner from asserting a claim against his Union and its officers based upon their undeniable misfeasance in handling a grievance pertaining to his right to return to service;

(2) Whether the denial of rights otherwise available under Sec. 153, Title 45, U. S. Code, solely because the employee has successfully asserted a claim for personal injuries in a negligence action against his employer under the Federal Employers Liability Act, Sec. 51-60, Title 45, U. S. Code, "limits or impairs the rights of employees under any other act or acts of Congress," contrary to the provisions of Sec. 58, Title 45, U. S. Code, Act of Congress April 22, 1908, c. 149, sec. 8, 35 Stat. 66.

(3) Whether the assertion of a claim for damages for negligence under the Federal Employers Liability Act, alleging "impairment" of capacity to work on account of the employer's negligence, permanently estops the employee from claiming a right to return to service under the operating agreement of his brotherhood upon regain-

ing and establishing ability to resume his duties as an engineer, where he has been retained on the duty roster of his employer throughout the pendency of his F. E. L. A. suit and down to and including the time of requesting a return to service.

STATUTES INVOLVED

29 U. S. Code Sec. 185 (b)
45 U. S. Code Sec. 153
45 U. S. Code Sec. 58

STATEMENT OF MATERIAL FACTS

This action was brought by Petitioner, a Railroad Engineer and dues-paying member of Respondent Brotherhood of Locomotive Engineers, for damages arising out of the mishandling of a grievance with his employer. More than one time limit was violated by the Union. Petitioner and his attorney were excluded. (Gibson Depo. p. 90-91; Johnson Depo. p. 34-36). Various steps in the prescribed grievance procedure were taken in the wrong order or omitted or re-traced. The appeal to the National Railway Adjustment Board was filed too late for Petitioner to get his back pay for the time he was denied a right to return to work while his name was in its regular place on the duty roster. Respondents, in support of their Motion for Summary Judgment, were unable to show anything they had done right; they did not assert the right to Summary Judgment because of any asserted diligence or good faith on their part. (Motion for Summary Judgment, Tr. 71).

In this, as in other such cases, Petitioner, as an employee-member of the Union, was not a party to the proceedings before the Board, or the grievance procedure leading up to the abortive appeal. If the Union had refused

outright to handle the grievance, Petitioner possibly may have had a right to a direct suit against his employer, but the Union assumed to handle the grievance and Petitioner was forced into the procedure called for by the Operating Agreement, relying solely upon the good faith and diligence, if any, of his Union and its officers.

The request to return to service was denied by the employer on the ground that Petitioner had "disqualified" himself by filing the Federal Employers Liability Act suit based upon negligence of the employer.

The ruling of the Board unfavorable to Petitioner was on the stated grounds (1) that his appeal was filed too late (Tr. 56) and (2) that his successful prosecution of the negligence case under Sec. 51-60, Title 45, U. S. Code (F. E. L. A.), permanently estops Petitioner from asserting a right to return to work. (Tr. 65-67).

The second holding was not compelled, as a matter of law, because Petitioner had not alleged occupational disability in his F. E. L. A. case. He only claimed "impairment" of general ability to earn money (Tr. 38). He did not obtain judgment for total and permanent occupational disability (Tr. 41). The amount did not fully cover loss of earnings accruing as of the time of the request to return to service. There was no compensation for future disability, although it was alleged. The Honorable Court of Civil Appeals errs in saying there was evidence that Petitioner had alleged Total and Permanent Disability. (The amended petition in the F. E. L. A. suit appears as Appendix F). That case has been before this Court on Writ of Certiorari to the Supreme Court of the State of Texas on other points. Thompson v. Gibson, 335 U.S. 18, 78 S.Ct. 2, 2 L.Ed.2d 1; Thompson v. Gibson, 290

S.W.2d 305; Thompson v. Gibson, 298 S.W.2d 97; Thompson v. Gibson, 310 S.W.2d 564.

The case at bar is not complicated with any complex rule of procedure peculiar to the Courts of Texas. The Honorable Court of Civil Appeals accepts without limitation the proposition that Respondents could not be entitled to summary judgment unless they, as movants, show as a matter of law that Petitioner had no cause of action before the National Railway Adjustment Board. (P. 4, Opinion of the Court, Appendix A). However, the Court erroneously bases its finding that Petitioner had no cause of action as a matter of law upon the single fact that the Board found against him.

Thus the Court accepts the doctrine, only partially stated in the Motion for Summary Judgment, but fully explored in Respondents' brief in the Court of Civil Appeals, that Petitioner is bound by the findings of the Board, even though said findings were procured through the efforts of respondents themselves, in a proceeding to which Petitioner was not a party.

The questions presented by this Petition therefore arose in the Trial Court with the granting of the Motion for Summary Judgment, which, in turn, was based solely upon the order of the National Railway Adjustment Board (Tr. 71).

REASONS FOR GRANTING THE WRIT

Although there may be some possible explanation for the result before the Board, erroneous as it may have been, it is felt that Respondents, as movants, wholly failed to show any reason why the Board was compelled, as a matter

of law, to apply the doctrine of collateral estoppel. The Court of Civil Appeals accepts this as the correct burden of respondents, but finds the solution in the very decision of the Board itself, rather than the facts presented in the Motion for Summary Judgment. The Court holds, in effect, that if there is evidence to support a holding of collateral estoppel, then the Union is entitled to summary judgment based upon the Board's finding. This is tantamount to saying that Petitioner is bound by findings of the Board, even though he is alleging that those findings were brought about by the misdeeds of the Respondents. It is accurate to say that Respondents mishandled the case, and had no satisfactory explanation for it; Petitioner alleged and testified that they did so from personal motives. Should Petitioner be denied his right of redress for this wrong by the very fact that such misdeeds resulted in an adverse ruling?

This Court, in the case of *Vaca v. Sipes,* ____U.S.____, 17 L.Ed.2d 842, 87 S.Ct. ____ (Case No. 114, decided February 27, 1967), had before it the case of a Union, in good faith, refusing to go to arbitration on the grievance of an individual employee. The Court held that the Union had a certain amount of discretion in deciding whether to arbitrate or not. In support of the good faith of the Union, the Court pointed out that the Union had secured a medical examination at its own expense, which proved to be unfavorable, and then decided against arbitration, none of which was done here. The Court discussed a number of situations in which the employee might be said to have a justiciable right against the Union or the Employer, under Sec. 301 of the Labor Management Relations Act, Sec. 185 (b), Title 29, U. S. Code. Although railroad employees are specifically exempt from

the provisions of Subchapter III, Conciliation of Labor Disputes, the remaining provisions of the Act, including Sec. 301 (29 U. S. Code, Sec. 185) protect Railroad Employees as well as others.

Section 301 provides:

> "Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor Organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

In *Vaca,* the Court held that a labor organization would be subject to suit under Section 301, either in State or Federal Courts. Although apparently not called upon to specifically decide the question, the court sanctioned the idea that responsibility for the consequences of "perfunctory" handling of a grievance, or "personal hostility" be the highest measure of the liability of the Union. Before the announcement of this decision, Petitioner had already set the course for this case by allegations of both personal hostility and perfunctory handling. (Tr. 2, Plaintiff's Original Petition, filed April 23, 1965). On his deposition, which was part of the Record on Motion for Summary Judgment, he gave testimony supporting these allegations. (Gibson Depo, pages 16-18; 21-22; 24-26; 32-35; 38-39; 90-91; 135-137; 141; 143; 145; 147; and 148).

It is felt that the Court of Civil Appeals was troubled with the thought that an employee has a right to sue his Union. Yet the *Vaca* case recognizes that right. This reluctance is emphatically demonstrated by the fact that, although *Vaca* was brought to the attention of the Court in Petitioner's Motion for Rehearing filed April 12, 1967 (the unofficial publication of the *Vaca* opinion in Vol. 17 L.Ed. (2), No. 8, p. 842, is dated the same date, March 30, 1967, as the opinion of the Court of Civil Appeals), that Court failed to write any other or further opinion in the light of the *Vaca* decision, and the case was, for all practical purposes, deliberately ignored by the courts below.

The same reluctance is also demonstrated by the fact that the Court refused to recognize that *Jones v. Central of Georgia,* (5th Circ., 1964), 331 F.(2) 649, the only Federal case holding that the doctrine of collateral estoppel applies as a matter of law (cited p. 5, Court's Opinion, Appendix A), had been overruled by the same Court on the same point in the only other Federal case cited by the Court, *Hodges v. Atlantic Coast Line Railroad Company,* (5th Circuit, 1966), 363 F.(2) 534. Although this state of the decisions was pointed out in both the Motion for Rehearing before the Court of Civil Appeals and in the Application for Writ of Error in the Supreme Court of Texas, both Courts ignored it, indicating that they preferred to ignore *Vaca* and intended to follow the overruled holding in *Jones v. Central of Georgia,* and the dicta in *Hodges v. Atlantic Coast Line Railroad Company,* in which Judge Gewin practically dissented from his own opinion by way of *obiter dicta.*

These cases, and those discussed therein, demonstrate that the Board is not prone to apply the doctrine of

collateral estoppel to such cases, and has refused to apply it on much stronger facts than the *Gibson* case. Even the *dicta* of the second *Hodges* decision by the Fifth Circuit would not apply here, because the amount of Petitioner's lost wages, at the time he applied for return to service, exceeded the amount of damages awarded to him.

Behind the idea for applying the doctrine of "collateral estoppel" to these cases is the thought that an employee commits a tort when he establishes in a court of law that his employer was negligent and injured him through no fault of his own. Thus, he is said to have "disqualified" himself for employment with that employer. Of course, to secure some rational connection, the doctrine is tied into the fact of a claimed disability, but it seems to be applied without regard to whether the disability in fact exists, or whether the employee is fully compensated for it. If such a rule is to be applied to railroad employees, they are then put to an election as to whether to waive important rights for partial or temporary disability resulting from the employer's negligence in order to retain the right to continued service.

In a very real sense, such a rule has the effect of "limiting or impairing the rights of employees under any other act or acts of Congress", and particularly the right to be protected in their job security under the Labor-Management Relations Act and the National Railway Labor Act, as well as the right to sue under the LMRA.

It is no answer to this to say that either the Board or the Court said Petitioner had successfully maintained a suit for total and permanent occupational disability, because he did not, and the record shows that he did not

do so. Appendix F. He was deprived of his rights, contrary to Section 58, Title 45, United States Code, just as surely as he would have been on a direct ruling by the Court, regardless of whether this end was accomplished by mis-labeling his pleadings, or by erroneously applying the doctrine of collateral estoppel as a matter of law. To say that Petitioner never had a chance to win because the Board, on facts which would have supported a finding to the contrary, concluded that he had collected damages for total and permanent disability, is equivalent to saying that in any case where the Board makes an adverse ruling the employee has no remedy against the Union. Stated another way, such a rule would require the employee to establish his case against the Union by showing that he had no chance to lose before the Board.

If the employee's suit under Section 301 against the Union is to be limited to cases where the Board has made a favorable ruling, or to cases where the Board could not have ruled otherwise, the remedy so painstakingly recognized in *Vaca* will have little value for the employee. Some remedy must be allowed in the case which can be won or lost, depending upon proper handling, and which is lost by negligence or intentional wrongdoing on the part of the employee's representative. To be sure, such cases will be difficult to establish to the satisfaction of a court or jury because of the hazards of the proximate cause question. The right should be recognized, though, and the decision of that question of fact should be reserved for a trial on the merits rather than being summarily determined as a matter of law on Motion for Summary Judgment.

CONCLUSION

It is respectfully submitted that the opinion and ruling of the Trial Court and the Court of Civil Appeals in this case is in direct conflict with the provisions of Section 58 of the Federal Employers Liability Act; that the denial of the right to sue the Union and its officers for misfeasance in handling the grievance, which denial is based solely upon the fact that there was an adverse ruling by the Board in the case handled by the Union itself, denies this Petitioner all the rights which this Court recognized in *Vaca v. Sipes;* that therefore a Writ of Certorari should be granted in order that this Court might review the record and the adverse ruling made by the Court of Civil Appeals and the Trial Court, and the refusal of a writ of error by the Supreme Court of Texas, and finally reverse the judgment of the Court of Civil Appeals and render judgment in favor of Petitioner that he is entitled to his trial by jury, and Petitioner prays for such other and further relief, general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

HARRY D. MOORELAND
1200 Atlas Building
Tulsa, Oklahoma

ERNEST L. SAMPLE
906 Goodhue Building
Beaumont, Texas

By_____
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition for writ of certirari has been mailed, on the 15th day of December, 1967, to the respondents' attorneys, as follows: Messrs. Garrison, Renfrow, Zeleskey, Cornelius & Rogers, P. O. Drawer 1448, Lufkin, Texas.

HARRY D. MOORELAND

APPENDICES A-K

APPENDIX A

CERTIFIED COPY OPINION

J. L. GIBSON, Appellant
No. 258
vs.
L. D. JOHNSON, ET AL

Appeal from the Third Judicial District Court
of Anderson County

This is an appeal from a summary judgment. Appellant, J. L. Gibson, brought suit against L. D. Johnson and the Brotherhood of Locomotive Engineers for damages alleging that he was a member in good standing with the Brotherhood and that as such Johnson and the Brotherhood had the contractual obligation to represent him in handling grievances against his former employer, Missouri Pacific Railroad Company; that on or about December 5, 1950, appellant while engaged in his duties as a locomotive engineer for Missouri Pacific received personal injuries as a result of which he was disabled from performing his duties and was therefore laid off and out of service because of his condition until July 5, 1958; that on said date he had fully recovered and was able to resume his employment as an engineer; that on said date Johnson was the chief officer and agent of the Brotherhood and was charged with the responsibility of representing the appellant in the preparation and presentation of his request to the railroad company to return to active duty;

that he requested Johnson and the Brotherhood to represent him in his application for reinstatement; that because of some ill will against him, Johnson and the Brotherhood, either intentionally or negligently, failed to properly present his claim to return to work. Specifically, he alleged that the appellees negligently failed to make a timely appeal of his claim to the National Railway Adjustment Board and also refused to allow his attorneys to participate in the hearing before the board; that as a direct and proximate result of the conduct of Johnson, which was condoned or participated in by the Brotherhood, appellant's application to return to work was denied and that by reason thereof he was entitled to compensatory and punitive damages against Johnson and the Brotherhood in the sum and amount of $250,000.00.

Appellees Johnson and the Brotherhood denied the allegations, both generally and specially, and filed a motion for summary judgment. In the motion for summary judgment, appellees offered evidence showing that appellant had suffered an injury while in the course of his employment with the railroad company in 1950 and as a result appellant had brought a suit against his employer, Missouri Pacific Railroad Company, for total and permanent disability; that in said suit appellant alleged that he was totally and permanently disabled; that his cause was finally submitted to a jury under instructions allowing the jury to award appellant damages for all past and future loss of earnings; as well as damages for all past and future pain and suffering; that as a result, the jury awarded appellant the sum of $32,500.00; that appellant ultimately collected the judgment in that amount in March, 1958; that within approximately four months thereafter, on July 5, 1958,

appellant filed a request with the railroad company requesting a return to duty as an engineer. The railroad refused the request. Thereupon, appellant sought the services of Johnson and the Brotherhood in the further presentation of his claim for restoration to duty with pay commencing on July 5, 1958. Johnson presented appellant's application to the various levels of railroad officials and being unsuccessful, thereafter appealed the appellant's claim to the National Railway Adjustment Board, hereinafter referred to as NRAB, which board also denied appellant's claim for re-employment, by an award dated October 31, 1963.

The award of the NRAB was attached to and made a part of appellees' motion for summary judgment. The original award, as well as the subsequent interpretative opinion and supporting opinion, makes it clear that the reason for the ruling of the board denying appellant the right to return to work as an engineer was because of the fact that he had previously filed a suit claiming total and permanent disability in which he recovered the sum of $32,500.00, and was therefore estopped to take a contrary position in his application for reinstatement, and the award also makes it clear that such facts were the sole and only reason for the award denying his right to return to work with the railroad. The award, together with the interpretative opinion and the supporting opinion, further shows that the board afforded appellant a full hearing on the merits of his claim and that the decision denying appellant's claim was not based upon any failure of the appellees to perfect any step in presenting the claim within the time limit prescribed. In reply to a dissenting opinion, the majority filed a supporting opinion which reads in part as follows:

> "The dissenters quite ineffectively complain against the well established rule enunciated time and again that once a plaintiff declares in Court he is permanently unable to perform work, in the future, at his railroad occupation, and offers proof in substantiation of his ability, he is no longer in position to claim, with respect to any alleged future rights or privileges, further employment under his prior employment contract."

Immediately following this, the board cited many cases and prior NRAB decisions announcing the rule of law that once a plaintiff has obtained a judgment against his employer for total and permanent disability as a result of an injury sustained in the course and scope of his employment, he is estopped from claiming any right to return to work for that employer. The award further stated that: "This was a simple case of a demand for return to service, wholly inconsistent with an F.E.L.A. trial had on that very issue. (See Jay Lee Gibson v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, N.O.T. & M. Ry. Co., District Court of Harris County, Texas, 129th Judicial District, Court of Civil Appeals, 290 S.W.2d 305, Supreme Court of Texas, 298 S.W.2d 97, Cert. granted by The Supreme Court of the United States, 355 U.S. 18, rehearing den., 355 U.S. 900)."

Appellant filed nothing in response to the motion for summary judgment.

After a hearing, the trial court rendered judgment reciting that the court was of the opinion and found that the evidence presented in connection with the motion for summary judgment shows that, except for the amount of damages, there was not a genuine issue of material

fact and that the appellees were entitled to a summary judgment as a matter of law.

Appellant excepted to the ruling of the court and perfected this appeal in which he insists that the trial court erred in granting the summary judgment because the evidence contained in the depositions on file in the cause raised a genuine issue of fact upon the questions of (1) whether appellees acted intentionally or in bad faith in presenting his claim; (2) whether appellees negligently failed to timely file his appeal with the NRAB; and (3) whether they intentionally or negligently refused to allow his attorney to participate in the proceedings.

Appellees contend that since the record shows conclusively that appellant had filed suit and collected for total and permanent disability against the railroad, appellant was estopped from asserting a right to return to work. Consequently, they assert that since successful prosecution of his claim was impossible, appellees' conduct in presenting his fruitless claim before the NRAB could not, as a matter of law, have been a causal factor in the adverse ruling and therefore their conduct was not a cause in fact of any damages suffered by appellant. We sustain the contention and affirm the judgment of the trial court.

A defendant moving for a summary judgment on the whole case assumes the negative burden of showing as a matter of law that the plaintiff has no cause of action against him, or that plaintiff's claim is barred as a matter of law by an affirmative defense. McDonald, Texas Civil Practice, Vol. 4, Sec. 17.26.1; Kellner v. Blaschke, (Tex. Civ. App.) 334 S.W.2d 315.

In determining a motion depending upon entrinsic evidence, the court's task is analogous to that which he per-

forms on a motion for directed verdict. He accepts as true the pleading and all evidence of the parties opposing the motion which tends to support such parties' contention, and gives him the benefit of every reasonable inference which properly can be drawn in favor of his position. McDonald, Texas Civil Practice, Vol. 4, Sec. 17.26; Gulbenkian v. Penn, 151 Tex. 412, 252 S.W.2d 929.

Appellant alleged a cause of action in tort for damages resulting from misfeasance or nonfeasance of his agents in handilng his claim of a right to return to work with the railroad. Because of the particular contractual relationship of agency involved here, it appears to us that the relationship of the parties was in many respects similar to that of attorney and client. For this reason, we think the rights of the parties would be controlled by the same rules governing the liability of an attorney to his client. In a situation involving the attorney-client relationship where the client seeks to recover against his attorney on the ground that the latter caused him to lose his cause of action, the burden of proof is on the client to prove that his suit would have been successful but for the negligence of his attorney, and to show what amount would have been collectible had he recovered judgment. "The attorney stands in exactly the same position as that in which the defendant in the lost suit would have stood in the trial against him, and is entitled to present to the jury every fact that would have tended to lessen the damages against that defendant." 7 Tex. Jur. 2d, Sec. 135, page 205.

Under the facts before us, we see no reason why the foregoing principles of law should not be applicable to the situation presented here.

Thus, in order for the principal (appellees) to prevail on motion for summary judgment and thereby defeat the agent's (appellant's) claim for damages for misfeasance or nonfeasance in handling his claim, the principal (appellees) would be required to conclusively show (1) that appellant would not have been successful even though the claim had been properly prosecuted or (2) that neither the alleged acts of misfeasance or nonfeasance proximately caused the adverse ruling or loss of his claim. In Jones v. Central of Georgia Railway Company, (5th Cir., 1964) 331 F.2d 649, the court said:

> "* * * The Trial Court did conclude that when an employee alleges and successfully proves in such a suit that he is permanently injured and disabled, rendering him unable in the future to perform the work of a switchman, or to do other manual labor, and is compensated for lost wages 'past, present and future' and the railroad company pays the full judgment pursuant to such a lawsuit, the railroad is not bound as a matter of law to retain the employee in its services with back pay. The Court grounded its decision on collateral estoppel. In our opinion the reasoning of the Trial Court is sound from a moral and a legal point of view in the circumstances of this case. * * *"

In Hodges v. Atlantic Coast Line Railroad Company, (5th Cir., 1966), 363 F.2d 534, the court said:

> "Without passing on the issue of estoppel, we feel compelled to say that we strongly disapprove of any practice which permits an employee to sue his employer claiming permanent and total disability establish his claim by proof which convinces the jury of the truth and justice of his allegations, obtain and

> collect a judgment, and then force his employer to reinstate him in his former position with back pay for time lost. The NRAB asserts that it recognizes and applies estoppel in appropriate cases, and that it has no sympathy for an employee who, by taking inconsistent positions, undertakes to collect twice for the same claim."

The court in that case went on to say: "It does seem to us that at some point in the procedure the matter of estoppel should have been considered and a decision rendered with respect to it."

The principle of collateral estoppel is recognized in this state. In Long v. Knox, 291 S.W.2d 292, the Supreme Court of this state said:

> "The doctrine of judicial estoppel is not strictly speaking estoppel at all but arises from positive rules of procedure based on justice and sound public policy. It is to be distinguished from equitable estoppel based on inconsistency in judicial proceedings because the element of reliance and injury essential to equitable estoppel need not be present. 'Under the doctrine of judicial estoppel, as distinguished from equitable estoppel by inconsistency, a party is estoppel merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertions sought to be made.' 31 C.J.S., Estoppel, § 121, p. 390; Grier v. Canada, 119 Tenn. 17, 107 S.W. 970; Sartain v. Dixie Coal & Iron Co., 150 Tenn. 633, 266 S.W. 313. It has likewise been held that it is not necessary that the party invoking this doctrine should have been a pary to the former proceeding. Hattan Realty Co. v. Baylies, 42 Wyo. 69, 290 P. 561, 72 A.L.R. 587; Corder v. G. B. Sprouse & Co., 20 Tenn. App. 486, 100 S.W.2d 1001."

Appellant recognizes the rule of estoppel as announced in the foregoing cases, but nevertheless insists that his pleadings alleging misfeasance and nonfeasance are sufficient to raise a fact issue upon the question of whether appellees properly presented the matter to the board. He seems to take the position that appellees should have in some manner convinced the board that estoppel was not applicable because his previous suit against the railroad was not in fact or in law a suit for total and permanent disability nor was the judgment large enough to show that he is being compensated for total and permanent disability. All proceedings in that suit were before the board, and based upon those proceedings, the board concluded that the facts sustained the railroad's defense of estoppel. The very same evidence is now presented to us for the purpose of showing that appellant's claim before the NRAB could not have been successfully prosecuted despite the conduct of appellees because of the legal barrier of estoppel. It is also presented to us for the purpose of proving the defense of estoppel in appellant's claim for damages.

In view of the law pronounced by the foregoing authorities, we have concluded that the evidence offered by the appellees in support of their motion for summary judgment is sufficient to establish the defense of estoppel and thereby defeat appellant's claim for damages. As we view it, the evidence conclusively shows that irrespective of any misfeasance or nonfeasance on the part of the appellees, appellant was estopped as a matter of law to claim his right to re-employment. The defense of estoppel having thus been shown to exist as a matter of law, the question of whether appellees were guilty of misfeasance

or nonfeasance becomes immaterial. Since appellant's claim against the railroad for re-employment was barred by estoppel, his claim for damages against appellees for misfeasance and nonfeasance in the prosecution of his claim would likewise be barred for the same reason. That is to say, appellant having alleged and proved in a former judicial proceeding in this state that he was totally and permanently disabled, he will not now be heard to say in this suit that he was not totally and permanently disabled for the purpose of establishing a cause of action against appellees for misfeasance or nonfeasance in presenting his claim before the NRAB. As we view it, the evidence was sufficient to establish facts which, if proven at the trial, would establish the defense of estoppel and thus entitle appellees to an instructed verdict.

The fact that appellees failed to perfect the appeal to the NRAB within the six months time as provided by the statute would not alter the situation because even though the appeal was filed late, the record conclusively shows that the NRAB nevertheless accepted the appeal on his claim for re-employment and determined same on its merits. Consequently, the conduct of appellees in this respect could not as a matter of law have been a cause in fact of the adverse decision denying appellant the right to return to work.

While the record does show that because of the late filing, the NRAB refused to consider that portion of appellant's appeal in which he claimed back pay commencing as of the date he filed his application to return to work, we think the record conclusively shows that appellant suffered no damages as a result thereof. Obviously, if appellant was disqualified from seeking re-

employment by reason of his suit against the railroad for total permanent disability, he would have no right to receive back pay, and would not therefore be entitled to assert a claim for damages based upon an alleged substantive right which did not exist.

The judgment of the trial court is affirmed.

JAMES H. MOORE
Associate Justice

March 30, 1967
Filed March 30, 1967

APPENDIX B

JUDGMENT OF THE COURT OF CIVIL APPEALS

Recorded Minute Book 1, p. 237

Entered March 30, 1967

This Cause came on to be heard on the transcript of the record; and the same being inspected, it is the opinion of the Court that there was no error in the judgment.

It is therefore, ORDERED, ADJUDGED AND DECREED that the judgment of the court below be in all things affirmed; that the appellees, L. D. Johnson and the Brotherhood of Locomotive Engineers, recover of and from the appellant, J. L. Gibson, and from the United States Fire Insurance Company, surety upon appellant's appeal bond, all costs in this behalf expended, both in this court and the court below, for all of which execution may issue, and that this decision be certified to the court below for observance.

APPENDIX C

Order of the COURT OF CIVIL APPEALS OVERRULING MOTION FOR REHEARING

Entered May 4, 1967

Recorded Minute Book 1, p. 242

Appellant's Motion for Rehearing having been duly considered, it is Ordered that said motion be, and hereby is overruled.

APPENDIX D

JUDGMENT OF THE TRIAL COURT

IN THE
DISTRICT COURT OF ANDERSON COUNTY
3RD JUDICIAL DISTRICT
STATE OF TEXAS

NO. 27,884

J. L. GIBSON
VS.
L. D. JOHNSON, ET AL

JUDGMENT OF THE COURT

BE IT REMEMBERED that on the 14th day of January, 1966, came on to be heard defendants' motion for summary judgment in the above entitled and numbered cause wherein J. L. Gibson is plaintiff and L. D. Johnson and the Brotherhood of Locomotive Engineers are defendants and it appearing unto the Court that such motion and an affidavit in support thereof was made in proper form and time, that proper service thereof was made and that all parties appeared before the Court and announced ready for a hearing thereon; and having considered the pleadings and depositions on file and defendants' motion for summary judgment, together with the affidavit in support thereof, the Court is of the opinion and finds that they show that a genuine issue of any material fact except as to the amount of damages does not exist between the plaintiff, J. L. Gibson and the defendants, L. D. Johnson and the Brotherhood of Locomotive Engineers, and that this summary judgment should be rendered in behalf of said defendants, and that said defendants are

entitled to a judgment herein that the plaintiff take nothing as a matter of law.

It is accordingly, ORDERED, ADJUDGED and DECREED that plaintiff, J. L. Gibson, take nothing of defendants, L. D. Johnson and the Brotherhood of Locomotive Engineers, by reason of this suit and that defendants go hence with their costs without day.

It is further ORDERED, ADJUDGED and DECREED that all costs herein be and they are hereby assessed against the plaintiff, J. L. Gibson, for which let execution issue.

SIGNED AND RENDERED on this 31st day of March, 1966.

R. W. Lawrence
Judge of the District Court of
Anderson County, Texas.

APPROVED AS TO FORM:

McCAIN, STANFORD & PRICE
Palestine Professional Building
700 North Sycamore Street
Palestine, Texas

DOERNER, STUART, MORELAND & SAUNDERS
Attorneys at Law
1218 Atlas Life Building
Tulsa 3, Oklahoma
By Harry D. Moreland
Harry D. Moreland

GARRISON, RENFROW, ZELESKEY,
CORNELIUS & ROGERS
By R. W. Hastedt
Attorneys for Defendants
P. O. Drawer 1448
Lufkin, Texas

APPENDIX E

ORDERS OF THE NATIONAL RAILROAD ADJUSTMENT BOARD

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
433 West Van Buren Street
Chicago, Illinois 60607
Telephone: 922-7664

RECEIVED
SEP 13 1965
NATIONAL RAILROAD
ADJUSTMENT BOARD
FIRST DIVISION

STATE OF ILLINOIS §
COUNTY OF COOK §

I, E. A. Killeen, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached documents with the originals on file and of record in my office, and that the attached documents are true and correct copies of Disputes Committee Case W-E-108, First Division Award No. 20 369, Interpretation of Award No. 20 369 and First Division Award No. 17 452.

E. A. Killeen
Executive Secretary, First
Division
National Railroad Adjustment
Board

STATE OF ILLINOIS §
COUNTY OF COOK §

I, M. E. Dillon, A Notary Public, do hereby certify that E. A. Killeen, personally known to me to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 13th day of September, 1965.

(L.S.)

M. E. Dillon
Notary Public

My commission expires the 17th day of May, 1966.

EXHIBIT "E-H"

Case W-E-108
(8-11-48 Agt.)

Mr. J. M. MacLeod, Executive Secretary,
First Div., National R. R. Adjustment Board,
39 South La Salle Street,
Chicago, Illinois.

Dear Mr. MacLeod:

In accordance with Resolutions adopted on July 1, 1952 and August 9, 1955 by the First Division, National Railroad Adjustment Board, this is to certify—

1. That the Joint Committee has rendered a decision disposing of the issue involving the Rules Agreement of August 11, 1948 on June 26, 1961.

2. (a) That the docket number of the Division identifying the case is BLE 37 133.

(b) That the claim covered by said docket is—

"Request of engineer Jay Lee Gibson that he be returned to the service and paid for all time lost since July 1, 1958."

(c) That the rule of the August 11, 1948 Agreement involved in the case is Section 17 (c).

(d) That the decision of the Joint Committee sustains the position of the respondent to the extent that "Claim for pay for time lost is barred under Section 17 (c)." Therefore, the dispute before the First Division, National Railroad Adjustment Board, is limited to that part of the claim which reads: "Request of engineer Jay Lee Gibson that he be returned to service * * *"

Yours very truly

JOINT COMMITTEE
RULES AGREEMENT OF
AUGUST 11, 1948

RECEIVED
FEB 5 1962
National Railroad
Adjustment Board
First Division

EMPLOYEE MEMBERS	CARRIER MEMBERS
P. S. Heath	J. J. Gahenn
M. W. Hampton	J. E. Wolfe
W. R. Meyers	B. B. Bryant

E A K

EXHIBIT "E"

Award 20369
Docket 37133

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago 3, Illinois
With Referee Walter L. Gray

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)

STATEMENT OF CLAIM: "Request of Engineer Jay Lee Gibson that he be returned to service and paid for all time lost since July 1, 1958."

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

The claimant, Jay Lee Gibson, an engineer for the carrier, was injured on December 5, 1950 on the property of the carrier. Subsequently suit was filed by the claimant against the carrier, under the Federal Employers' liability Act for the sum of $80,000. Judgment was rendered in the lower Court of Harris County, Texas for the sum of $32,500. This was appealed to the Court of Appeals where the judgment of the lower Court was sustained. Thereafter the case was appealed to the Supreme Court of Texas where the judgment was reversed. It was then appealed to the Supreme Court of the United States where

the ruling of the Supreme Court of Texas was reversed and the judgment ordered paid.

Settlement was made for $32,500 plus $4,832.90 interest in full satisfaction of the judgment as rendered against the carrier.

Some four months later the claimant advised the company that he was ready to report for duty as soon as he could get all of his physical examinations and requested that he be given the right for the examinations.

This request was denied by the carrier on the theory that the engineer had disqualified himself for service as an engineer and that he was thereby considered to have severed his employment relationship with the carrier.

EXHIBIT "F"

E A K

This matter was then appealed by the representatives of the Brotherhood who urged that Mr. Gibson be given such physical examinations. These requests were denied.

It was pointed out in the record, and it seems that there is no denial, that at the time of the filing of the appeal by Engineer Gibson for his physical examinations that his name with his seniority date had been posted on the seniority list continuously so it must be presumed that he is still being carried on the seniority list by the carrier.

This Division, acting with this Referee, in Award 20166 had before it a case of where a man had entered into a consent judgment and the claim was denied. After considering all the facts as set forth in the record and in the transcript of testimony in the lower Court we do not feel that the instant case has all the elements as were set forth in Award 20166.

This Division does not in any way, in this award, seek to set aside any awards as cited by either the carrier or the claimant. We feel that this case should be determined entirely on the facts and circumstances peculiar to this case only.

In the original complaint, as filed, this claimant had asked to be restored to service with pay for all time lost. This matter was disposed of by the Disputes Committee which held that the claimant was not entitled to back pay because of the time limits involved and stated that the only question to be determined by this Division was that of return to service.

Taking into consideration all the facts as developed in this case we do not feel that it was proper for the carrier to notify the claimant that his services had been terminated and his employment relationship severed since he was still on the posted seniority lists.

In support of this view this Division adopts that portion of Award 17452 by this Division which reads in part as follows: "Claimant technically has not been discharged by the carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."

AWARD: Claim disposed of as per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION
ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1963.

Champlin-Shealy Co., Chicago, Ill. Printed in U. S. A.
20369

EAK

Award 20369
Docket 37133

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South LaSalle Street, Chicago 3, Illinois

PARTIES TO DISPUTE:
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
MISSOURI PACIFIC RAILROAD COMPANY
(Gulf District)

The Brotherhood has asked for an interpretation of the award handed down on October 31, 1963, in this matter.

It is felt that a careful reading of the award is plain and unambiguous but in order that we may set forth with clarity the position of this Referee when the award was rendered, may we specify the following particulars:

1. The Disputes Committee had previously disposed of any question of back pay and therefore this question is not before us now nor was it before us when the award was rendered on October 31 as agreed by all parties.

2. Award 20369 was rendered on the same reasoning and logic of Award 17452 which reads in part:

> "Claimant technically has not been discharged by carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work."

Some question is raised in argument now that the omission of the sentence following this quotation from that award reading, "Consequently he is automatically on

perpetual leave of absence" has some significance. It did not seem so to this Referee because it was the intention of Award 20369 that Jay Lee Gibson is entitled to all the benefits the same as if he were on a retired basis as an employee.

3. It was the opinion of the Referee that termination of the claimant's employment relationship was not proper since his name was retained on the posted seniority lists; but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held.

It is, therefore, the opinion of this Referee that the points as set forth above should clarify the question raised by the Brotherhood in its letter of

EXHIBIT "G" EAK

December 16, 1963. If we should enter an interpretation coinciding with the Brotherhood's position set forth in that letter, we would in effect be changing the award or readjudicating the case, and it is felt, as stated, that the award is plain and unambiguous.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION
ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of March 1964.

DISSENT OF LABOR MEMBERS

The Referee denied the request for restoration to active service of claimant engineer, saying his decision is bot-

tomed "on the same reasoning and logic of Award No. 17452, which reads in part:

> " 'Claimant technically has not been discharged by carrier but has been paid in advance what the Court found to be due him for being permanently deprived of his work.' "

Then, he goes on to say (with reference to his Findings in Award No. 20369), ". . . but it was not intended to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held." Award No. 20369 (Docket No. 37133) contains no such holdings in its Findings. The basis for the statement as made in the interpretation is thus found to be utterly non-existent in the source cited by the Referee.

In addition, it was contrary to the evidence before the Division. The Carrier controverted claimant's position with reference to the nature and extent of his injuries in the course of the suit for damages—the complete Transcript was available for the Referee; his attention was called to the fact. On the specific question of claimant's working ability, at time of trial and in the future, a Dr. Edward T. Smith was presented as an expert witness on Carrier's behalf. After testifying in some detail as to the nature and results of examinations he had made of claimant, Dr. Smith flatly stated, ". . . it would be the best thing for him to do, go back to work." Dr. William M. Palm, testifying as an expert witness for the Carrier, said some of claimant's alleged symptoms were exaggerated and others were impossible for him to have. When asked if, in his opinion, claimant

could and should return to work, Dr. Palm, replied, "yes, sir." Carrier's expert medical witness, Dr. James Greenwood, testified at time of trial, some five years after date of injury, "I thought he could go back to work in thirty to sixty days." Finally, medical expert, Dr. H. V. Haverlah, for the Railroad, testified he had recommended claimant ". . . be permitted to return to work in Diesel engine service." A letter written by Dr. Haverlah on February 2, 1952, was introduced as evidence and in it he recommended claimant be returned to work.

The statement in Interpretation to Award No. 20369 (Docket No. 37133) is contrary to the evidence in the case and was not made in the Findings of Award No. 20369, as the Referee says.

This leave as the basis for denying claimant's request for restoration to active service, the excerpted holding from Findings of Award No. 17452, that

I-20369
EAK

the man ". . . has been paid in advance what the court found to be due him for being permanently deprived of his work. . ."

The Transcript of the Court proceedings disproves this, also. Claimant was just short of 49 years of age at the time of the trial and was shown to have a life expectancy of 25.21 years; he had been out of service virtually the entire period from December 5, 1950 (date of injury) to August, 1955 (the time of trial); his loss of pay approximated $30,800, and the jury awarded him $32,500, which was just about enough to reimburse him for that loss. At the end of the Transcript of the Court proceedings, were depositions from some of the jurors

showing how they reached their verdict. All twelve jurors wrote down what they thought claimant should be awarded; the amounts were found to range from zero to substantial sums; they were added up, divided by twelve, and this came out to $35,000. After some more haggling among themselves, the twelve jurors reached agreement on the sum of $32,500, and that became their verdict. We have pointed out above that claimant had already lost about $30,000 in earnings down to time of trial.

On these matters of evidence, Referee Gray premises his Findings that the verdict constituted ". . . what the Court found to be due him for being permanently deprived of his work. . ." Less than $2,000 is taken by this Referee as adequate payment for the next 25.21 years of claimant's life.

The decision is rooted in error, is contrary to the evidence, and does violence to reason. The language in the Findings of Award No. 20369 (Docket No. 37133);

"This Division does not in any way, in this award, seek to set aside any of the awards as cited by either the carrier or the claimant. We feel that this case should be determined entirely on the facts and circumstances peculiar to this case only.", is surplusage. The author of them need not be apprehensive that Award No. 20369 (Docket No. 37133) could possibly be taken as having the effect of overturning the great weight of authority on this Division, which was cited to him (for example, see the Labor Members' Supporting Opinion to Award No. 19276), nor that it would be taken as controlling precedent in any subsequent similar case. This appears to be a graphic illustration of the device sometimes employed by referees who wish to follow personal leanings in deciding a case,

knowing they are running counter to the evidence, the weight of authority and all semblance of logic. By incorporating language in their findings disclaiming any planned purpose or intent to disregard prior awards, et cetera, they deny a valid claim alleging their decision is justified by "the particular circumstances" of the case and extend a measure of comfort to those wronged by declaring their miscarriage should not be followed in future.

For obvious reasons, the author of Award No. 20369 (Docket No. 37133) need have little fear the mistakes will be taken as a basis for wronging other claimants in the future; we are confident it will be rejected if cited.

For these reasons, we dissent.

G. L. Buuck
Don A. Miller
K. Levin
B. W. Fern
W. R. Meyers

I-20369 EAK

SUPPORTING OPINION OF CARRIER MEMBERS

Once more we have the dissenters contending that an employee of a railroad by some super-privileged status, not any more clearly reasoned than that, shall be permitted to offer proof that he is permanently incapable of performing work in one legal proceeding against an adversary and in a later proceeding against the same adversary assert that he has recovered and is capable of performing that very work.

This contention has been soundly denounced in every

court decision of the identical fact framework in this railroad industry. They are:

Alcorn v. Missouri-Kansas-Texas R. Co. (D.C. Mo. 1950) 88 F. Supp. 471.

Buberl v. Southern Pacific Co. (D.C. Cal. 1950) 18 L.C. P 65,925, 94 F. Supp. 11.

Wallace v. Southern Pacific Co. (D.C. Cal. 1951) 21 L.C. P 66,882, 106 F. Supp. 742.

Pendleton v. Southern Pacific Co. (C.C. Cal. 1952) 21 L.C. P. 66,883.

Scarano v. Central R.R. Co. of New Jersey (Ruling Case Law) (D.C. Pa. 1952) 22 L.C. P 67,213, 107 F. Supp. 662-aff'd (CA-3 1953) 23 L.C. P 67,540, 203 F. 2d 510.

Sands v. Union Pacific R.R. Co. (D.C. Ore. 1956) 31 L.C. P. 70,437, 148 F. Supp. 422.

Lazaro V. Chavira v. Southern Pacific Co. 49 L.C. P 16,970 (Sept., 1960).

Ellerd v. Southern Pacific R.R. Co. (D.C. Ill. 1961) 42 L.C. P 16,824, 191 F. Supp. 716.

Jacksonville Terminal Co. v. Kirkland (Circuit Court, Duval County, Fla.) No. 60-2320-E; 1962.

New York Central R.R. Co. v. Robert Rials (D.C. Ill. 1962) Civil No. 5021.

Ezra Jones v. Central of Ga. Ry. Co. (D.C. Ga. 1963) Civil No. 8199.

The dissenters labor vaingloriously against this long line of judicial opinion by referring to some "authority on this Division". Such a quixotic attempt to throw "Awards" of this Agency against the force of law is surely tilting with windmills. Moreover the "awards" are self-contradictory for many hew to the rule of law.

This was a simple case of a demand for return to service, wholly inconsistent with an F.E.L.A. trial had on that very issue (See Jay Lee Gibson v. Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, N.O. T.&M. Ry. Co., District Court of Harris County, Texas, 129th Judicial District, Court
I-20369
EAK
of Civil Appeals (290 S.W.2d 305), Supreme Court of Texas (298 S.W.2d 97), Cert. granted by The Supreme Court of the United States (355 U.S. 18), re-hearing den., (355 U.S. 900)).

The dissenters quite ineffectively complain against the well established rule enunciated time and again that once a plaintiff declares in Court he is permanently unable to perform work, in the future, at his railroad occupation, and offers proof in substantiation of his disability, he is no longer in position to claim, with respect to any alleged future rights or privileges, further employment under his prior employment contract." (e.g. Rials, supra).

E. T. Horsley

The undersign concur:

H. W. Burtness
J. E. Carlisle
H. J. Reeser
H. V. Bordwell

Champlin-Shealy Co., Chicago, Ill. Printed in U.S.A.
I-20369
EAK

APPENDIX F

PLAINTIFF'S TRIAL PETITION IN THE F. E. L. A. CASE

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

NO. 413,924

JAY LEE GIBSON
v.
GUY A. THOMPSON, TRUSTEE, ET AL

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO SAID HONORABLE COURT:

COMES NOW Jay Lee Gibson, hereinafter called Plaintiff, complaining of New Orleans, Texas & Mexico Railway, and Beaumont, Sour Lake & Western Railway, and International-Great Northern Railroad Company, all hereinafter called Defendants, and filing this his First Amended Original Petition would respectfully show unto the court the following:

I.

The Plaintiff is a resident citizen of DeQuincy, Louisiana. The Defendants, New Orleans, Texas & Mexico Railway and Beaumont, Sour Lake & Western Railway and International-Great Northern Railroad Company, are corporations duly incorporated and existing under and by virtue of law. The Defendant, Guy A. Thompson, is the

duly appointed and qualified trustee of and for each of the above named railroad companies, the said Defendant, Guy A. Thompson, being so appointed trustee of the corporations above mentioned by the United States District Court for the Eastern District of Missouri in a proceeding brought by the Missouri Pacific Railway Company as debtor for reorganization, and such appointment being made and had prior to the accrual of the Plaintiff's cause of action and prior to the injuries to Jay Lee Gibson and prior to the filing of this suit, and that under and by virtue of such appointment the Defendant, Guy A. Thompson, is now, as he was at the time of the injuries to Jay Lee Gibson, acting as such trustee for the corporations above mentioned, and is now, as he was at all times material to this suit, in possession of and operating the properties of the said New Orleans, Texas & Mexico Railway, Beaumont, Sour Lake and Western Railway, and International-Great Northern Railroad Company each of

(L.S.)

EXHIBIT "B"

said companies being engaged in the operation of same as a common carrier for hire, and that the Defendant, Guy A. Thompson, trustee, as aforesaid, has an agent residing in Harris County, Texas, upon whom service of process as against him as trustee of the railroad companies mentioned may be had. At the time of accrual of Plaintiff's cause of action as hereinafter declared upon, and at this time, the said Guy A. Thompson, as trustee of and for said above named railroad companies, operates a line of railway into and through the said County of Harris in the State of Texas.

II.

On the 5th day of December, 1950, the plaintiff herein was an employee of one or more of the above named Defendant railroad companies, working as freight-train engineer, and had been so employed for a long time prior to December 5, 1950. On the date referred to the Plaintiff herein was discharging his duties for one or more of the above named Defendants, working as a freight-train engineer on an engine and train which was owned or controlled by one or more of the above named Defendants. The Plaintiff about 1:40 a.m. on December 5, 1950, was walking from the roundhouse at Settegast Railroad Yards to his engine which had been spotted at a point some distance from the roundhouse, when because of the unsafe condition of the railroad yard, it having been covered with a large amount of loose gravel made up of large and small stones, the Plaintiff was caused to slip and fall, striking his head with great force and violence on the rail of one of Defendants' tracks and severely twisting, jarring, straining and jerking his body. At the time the Plaintiff fell as above described, Plaintiff was in the course and scope of his employment for one or more of the above named Defendants, and was about their business and affairs, and he was going by the most direct route to the engine which had been assigned to him, which engine at that time was located in the Settegast Railroad Yards, in Harris County, Texas. As a result of the fall above described, the Plaintiff suffered and sustained the serious, permanent and disabling injuries as hereinafter described.

III.

The Plaintiff had been assigned by his employer to a freight engine and made-up freight train for the purpose

of operating said engine and hauling said freight-train as its engineer from Houston, Texas, to DeQuincy, Louisiana, a normal and regular run which Plaintiff had been making for some time prior to December 5, 1950. The run that Plaintiff had been assigned on December 5, 1950, was a return from Houston, Texas to DeQuincy, Louisiana.

IV.

The Defendants herein, and their agents, servants and employees aforesaid, for whose acts the Defendants are under law in all things responsible, were guilty of negligence at the time and place of Plaintiff's fall as herein complained of, in each and all of the particulars hereinafter enumerated, which said acts of negligence upon their part, separately and concurrently, were a proximate cause of the Plaintiff's fall and of the injuries suffered and sustained by him, and which said acts of negligence were:

1. In spotting the engine which the Plaintiff was to operate in an unsafe place under the circumstances and conditions then existing.

2. In requiring the Plaintiff to walk from the roundhouse across the yard to his engine under the circumstances and conditions then existing.

3. In covering the railroad yard about and between the tracks where Plaintiff was required to walk with large and small pieces of stone.

4. In failing to use gravel of uniform size about and between tracks where Plaintiff was required to walk.

5. In failing to firmly pack the gravel about and between the tracks at the place in question.

6. In failing to properly illuminate that portion of the yard which Plaintiff was required to use in carrying out his duties.

7. In failing to properly illuminate that portion of the yard where Plaintiff slipped and fell.

8. In failing to provide a smooth walkway or path across the yards to the place where the engine was spotted.

9. In failing to furnish the Plaintiff with a safe place to work.

V.

As a result of the fall above described, Plaintiff suffered and sustained a great and tremendous shock to his entire nervous system. Plaintiff was also caused to suffer and sustain a severe injury to his head and an injury to his back of such a degree as to seriously injure his back and permanently impair Plaintiff's (L.S.) ability to work and earn money. At the time of the injuries suffered and sustained by the Plaintiff he was a strong, healty, robust man 45 years of age with a life expectancy of 25.21 years according to the Commissioner's 1941 Standard Ordinary Table of Mortality. Plaintiff had for many years prior to the date of the receipt of his injuries been employed by one or more of the Defendants as a freight-train engineer and in such capacity was earning and was capable of earning the sum of $550.00 per month, or $6,600 per year, with reasonable expectations of an increase in salary in the future. The injuries suffered and sustained by

the Plaintiff are of such a nature as to cause him to suffer severe physical pain and mental anguish for the balance of his life. Further, as a result of the injuries suffered and sustained by the Plaintiff, and by virtue of the physical pain and mental suffering which he has suffered in the past and which he will in reasonable probability suffer in the future, and because of Plaintiff's disability to work, which is permanent, and because of the loss of earnings in the past and the earnings which in reasonable probability will be lost in the future as a result of his injuries, and because of all the things and matters in this paragraph alleged, the Plaintiff has been damaged in the sum of $80,000.00, for which amount he here now sues.

WHEREFORE, premises considered, and the Defendants having been already cited to appear and answer herein, Plaintiff prays that upon a trial hereof he have judgment of the court for his damages, and for costs of court, and for all such other and further relief, both general and special, legal and equitable, to which he has shown or may show himself justly entitled.

FRED PARKS, GEORGE E. CIRE and
DOERNER, RINEHART & STUART

By George E. Cire
Attorneys for Plaintiff

Fred Parks and George E. Cire
504 Sterling Building
Houston 2, Texas
Doerner, Rinehart & Stuart
1510 National Bank of Tulsa Building
Tulsa, Oklahoma
(L.S.)

STATE OF TEXAS
COUNTY OF HARRIS

I, R. J. Lindley, District Clerk of Harris County, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, filed on: Jun. 29, 1955, as appears of record in my office.

Witness my official hand and seal of office, this Sep. 1, 1965.

(L.S.)

R. J. LINDLEY, DISTRICT CLERK
Harris County, Texas

By W. Snell, Deputy

From the Clerk's Office, Court of Civil Appeals at Tyler

APPENDIX G

ORDERS OF THE SUPREME COURT OF TEXAS IN THE SUPREME COURT OF TEXAS

No. B-296

J. L. GIBSON

vs.

L. D. JOHNSON & BROTHERHOOD OF LOCOMOTIVE ENGINEERS

July 26, 1967

From Anderson County,
Twelfth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is refused.

It is further ordered that applicant, J. L. Gibson, and surety, United States Fire Insurance Company, pay all costs incurred on this application.

No. B-296

J. L. GIBSON

vs.

L. D. JOHNSON & BROTHERHOOD OF LOCOMOTIVE ENGINEERS

October 4, 1967

From Anderson County,
Twelfth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 5th day of October, 1967.

GARSON R. JACKSON, CLERK

(SEAL)

/s/ By Jewell Seelinger, Deputy
Mrs. Jewell Seelinger

Filed: October 13, 1967.

APPENDIX H

Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. Apr. 22, 1908, c. 149, § 8,35 Stat. 66.

APPENDIX I

Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agents; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or

(2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

service of process

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX J

National Railroad Adjustment Board— Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve;

but no labor organization shall have more than one representative on any division of the Board.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, fireman, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such

dispute must be made by the entire division as hereinafter provided.

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(*o*) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

APPENDIX K

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

LIBRARY
SUPREME COURT, U. S.

JAN 15 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 929.

JAY LEE GIBSON,

Petitioner,

v.

L. D. JOHNSON and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS IN OPPOSITION.

HAROLD A. ROSS,
ROSS & KRAUSHAAR,
730 Standard Bldg.,
Cleveland, Ohio 44113,

HENRY H. ROGERS,
GARRISON, RENFROW, ZELESKEY,
CORNELIUS & ROGERS,
Post Office Drawer 1448,
Lufkin, Texas 75901,
Attorneys for Respondents.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

TABLE OF CONTENTS.

Question Presented ---------- 1

Statement ---------- 3

Reasons for Denying the Writ ---------- 10

Conclusion ---------- 17

TABLE OF AUTHORITIES.

Cases.

Gunther v. San Diego & Arizona Eastern Ry., 382 U. S. 257 (1965) ---------- 13, 16

Hodges v. Atlantic Coast Line R. Co., 363 F. 2d 534 (5th Cir. 1966) ---------- 15, 16

Humphrey v. Moore, 375 U. S. 335 (1963) ---------- 12, 13

Jones v. Central of Georgia Ry. Co., 331 Fed. 649 (5th Cir. 1964) ---------- 15, 16

Steele v. Louisville & N. RR., 323 U. S. 192 (1944) ---------- 12

Thompson v. Gibson, 290 S. W. 2d 305 (1956) ---------- 5

Thompson v. Gibson, 298 S. W. 2d 97 (1957) ---------- 5

Thompson v. Gibson, 310 S. W. 2d 564 (1958) ---------- 5

Thompson v. Gibson, 355 U. S. 18 (1957) ---------- 5

Vaca v. Sipes, 386 U. S. 171 (1967) ---------- 14

Statutes.

Labor-Management Relations Act, § 301 ---------- 11

Railway Labor Act, Section 3, First (p) (45 U. S. C. 153, First (p); 44 Stat. 578, as amended 48 Stat. 1189) ---------- 2, 17

Other.

Van Zile, *The Componential Structure of Labor-Management Contractual Relationships; Republic Steel Corp. v. Maddox* and *Humphrey v. Moore*, 43 U. DET. L. J. 334-5 (1966) ---------- 13

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 929.

JAY LEE GIBSON,

Petitioner,

v.

L. D. JOHNSON and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

A locomotive engineer was seriously injured during the course of his employment. Subsequently, he brought suit under the Federal Employers Liability Act against his employer railroad. In that suit, the engineer alleged that his injuries were serious, permanent and disabling and caused him to be permanently disabled to work and permanently impaired from earning a livelihood. About four months after recovering judgment, the engineer requested his return to work. When the carrier refused, he asked his union to process a grievance in his behalf. After the engineer's grievance was finally declined by the railroad, the union submitted his claim to the National Railroad Adjustment Board for compulsory and final arbitration under

Section 3, First (p) of the Railway Labor Act, prior to the 1966 amendment. (45 U. S. C. 153, First (p); 44 Stat. 578, as amended 48 Stat. 1189.) The Board, with a neutral referee, both in its original opinion and its opinion on interpretation requested by the union, refused to order reinstatement on the ground that his claim against the employer railroad for return to work as an engineer was estopped by the judgment rendered in the Federal Employers Liability Act case against the same railroad. The Adjustment Board said that, having gained judgment against the carrier for permanent inability to perform work as locomotive engineer, he could not later assert that he was capable of resuming work as a locomotive engineer for the railroad. The engineer then brought suit against his union for mishandling his grievance or claim to return to work.

The question presented is whether, in a suit brought in a state court against the union representative for alleged misfeasance or nonfeasance in handling the claim through the grievance and arbitration procedures, the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas erred in granting summary judgment for the union on the basis that the employee's claim before the Board could not have been sustained, despite any conduct of the union representative, due to the doctrine of collateral estoppel applied by the Board in its final and binding decision on the claim for reinstatement.

STATEMENT.

On December 5, 1950, petitioner, a locomotive engineer, suffered on the job injuries. (Tr. 30.) Petitioner then brought suit against his employer railroad under the Federal Employers Liability Act. (Tr. 29-34, 35-40.) In the original petition, filed December 5, 1952, in that suit, petitioner alleged that as a result of the accident he had suffered and sustained "serious, permanent and disabling injuries." (Tr. 31.) Petitioner alleged in effect that he suffered and sustained a great and tremendous shock to his entire nervous system and an injury to his back of such a degree "to permanently impair plaintiff's ability to work and earn money," which injuries "are of such a nature as to cause him to suffer pain for the balance of his life." (Tr. 32-33.)

In the amended petition, filed January 29, 1955, in the FELA suit, petitioner alleged, in effect; that he had earned and was capable of earning $550.00 per month or $6,600.00 per year, and that he sustained a tremendous shock to his entire nervous system (Tr. 38) and a severe injury to his head and back such as to permanently impair plaintiff's ability to work and earn money. He further alleged:

> "*The injuries suffered and sustained by plaintiff are of such a nature as to cause him to suffer severe physical pain and mental anguish for the balance of his life.* Further, as a result of the injuries suffered and sustained by the plaintiff, and by virtue of the physical pain and mental suffering which he has suffered in the past and which he will in reasonable probability suffer in the future and *because of plaintiff's disability to work, which is permanent,* and because of the loss of earnings in the past and the earnings which in reasonable probability will be lost in the future as a result of his injuries * * * plaintiff has been damaged in the sum of Eighty Thousand Dollars ($80,-

000.00) for which amount he here now sues." (Tr. 38-39.)

Petitioner's testimony in 1955, adduced in the FELA case, was to the effect that he had not worked since January 13, 1951; that he was not able to work and that his condition had become worse since the accident; and that he knew that he couldn't go back to work for the railroad because of this condition. (Tr. 77.)

Petitioner further supported his allegation of permanent disability by introducing the testimony of Dr. N. Stuart White, of Tulsa, Oklahoma, which was substantially that: Plaintiff sustained an injury to the dorsal and cervical spine, *aggravating a pre-existing arthritic condition;* that he sustained a disc injury in both the cervical and lumbar region of the spine. In addition plaintiff sustained a skull injury, causing damage to the pituitary gland causing a rapid increase in weight resulting in slow reaction to questions and as a whole; and that as a result of these injuries plaintiff was "* * * *totally and permanently disabled from performing any type of manual labor.*" (Tr. 78-79.)

The former suit went to trial before a jury on July 11, 1955. (Tr. 41.) In submitting the damage issue in the case, the court charged the jury that they could consider, *inter alia,* the reasonable present cash value of lost earnings that plaintiff would in reasonable probability sustain beyond the date of trial as the result of the accident in question. (Tr. 46-47.) The court further instructed the jury that in arriving at the amount of damages to be awarded petitioner in that suit, the jury could not consider or allow any recovery for past or future physical pain and mental suffering or past or future loss of earnings, if any, caused by arthritis or other condition, if any, which existed prior to the occasion made the basis of the suit, ex-

cepting so far as such physical pain and mental suffering or loss of earnings, if any, resulted from an aggravation of such a prior condition of arthritis or other conditions. (Tr. 47-48.)

The jury found damages of $32,500.00. (Tr. 46.) That suit went to the Texas Court of Civil Appeals which affirmed the trial court in *Thompson v. Gibson,* 290 S. W. 2d 305 (1956). This decision was reversed by the Texas Supreme Court, *Thompson v. Gibson,* 298 S. W. 2d 97 (1957). This Court subsequently reversed the Texas Supreme Court in *Thompson v. Gibson,* 355 U. S. 18 (1957). The suit was the subject of further opinion by the Texas Supreme Court in *Thompson v. Gibson,* 310 S. W. 2d 564 (1958), and mandate was issued on March 14, 1958. (Tr. 52.)

About four months later, July 5, 1958, petitioner requested permission from the employer railroad to return to work. (Gibson Dep. pp. 57-63; Johnson Dep. p. 10.) This request was denied by the railroad. Petitioner then sought and obtained the assistance of Respondent Johnson in the further handling of his claim or grievance with the railroad. Respondent Johnson commenced processing Gibson's claim through the various levels of railroad officials, all without success. On June 11, 1959, the last railroad official to whom the dispute could be appealed refused petitioner's claim for return to service on the ground that plaintiff was disqualified from further service because he pleaded and proved that he was permanently disabled as a result of injuries in the former FELA case. (Johnson Dep. pp. 24-25.)

On October 12, 1959, respondents submitted petitioner's claim to the National Railroad Adjustment Board under Section 3, First (p) of the Railway Labor Act. (Johnson Dep. pp. 25-26.) Coupled with petitioner's claim for

re-employment was a claim for lost earnings resulting from the railroad's refusal to permit his return to work. The lost pay portion of petitioner's claim was referred by the Adjustment Board to the Joint Dispute Committee under the National Rules Agreement of August 11, 1948 which pertains to time limitations on claims for pay for time lost. The Dispute Committee held that the claim for lost pay was foreclosed because the appeal on that subject had not been perfected to the Adjustment Board within the six month limitation period as prescribed by Section 17(c) of the August 11, 1948 agreement. The Dispute Committee also held that plaintiff's claim to return to service was to be determined by the Adjustment Board. (Tr. 56-57.)

On October 31, 1963, the NRAB, with the neutral referee required to break the deadlock of the employee and carrier members, considered petitioner's claim for return to service on the merits and held adversely to petitioner. (Tr. 58-60.)

On December 16, 1963, Respondent Brotherhood requested an interpretation of the award. The interpretive opinion of the NRAB, dated March 18, 1964, consists of the opinion written by the referee (Tr. 61-62), the dissent by the labor members (Tr. 62-65) and the supporting opinion of the carrier members. (Tr. 65-67.) The referee's opinion shows that the original award in the instant case was rendered "on the same reasoning and logic" as that adopted in Board Award 17452, which was cited and partly quoted in the original award. The cited award (Tr. 68-70) was a claim similar to petitioner's wherein that claimant had recovered in a FELA suit the sum of Twenty Thousand Dollars ($20,000.00) for total and permanent disability and later requested return to service. In the cited claim, the Board held that the claimant had been paid in advance what the court found to

be due him for being permanently deprived of his work. In requesting the interpretation in the instant case, respondents argued, as indicated in the referee's opinion, that the limited use of language by the Board from the authority cited did not mean that petitioner was to be kept out of service. The referee responded, however, that the original award did not intend "to put the claimant back on the engine or return him to engine service as it was felt his testimony and that of expert medical witnesses proved that such would be unwise, and the award so held." (Tr. 62.)

The dissenting opinion of the labor members of the Board stated that the complete transcript of the FELA case was before the referee, that respondents called the Board's attention to the fact that in petitioner's FELA trial the railroad had controverted his claim regarding nature and extent of injury, and that respondents pointed up the medical testimony of four doctors indicating petitioner was not then disabled. (Tr. 63.) In a supporting opinion, the carrier members of the Board cited a number of court decisions as authority for the application of estoppel in denying reinstatement. Both the original award and the subsequent interpreting opinion of the NRAB demonstrate that the doctrine of estoppel was applied, based on petitioner's prior claim of disability and payment therefor in his FELA case, and that this was the sole basis of the award.

Having failed to require the railroad to return him to duty by means of the grievance and arbitration procedures, petitioner brought an action in the Third Judicial District Court of Anderson County, Texas, on April 23, 1965, charging respondents with mishandling "his claim for reinstatement in such a manner that the same would be lost otherwise and upon its merits," and that he was en-

titled to damages on that account, actual and punitive, of $250,000.00. (Tr. 2-10.)

By amended answer, respondents asserted a general denial and specifically denied that any conduct of respondents caused the decision of the Adjustment Board which denied petitioner's claim to be restored to his former employment. (Tr. 15-16.) Respondents also affirmatively alleged the presentation of plaintiff's claim to railroad officials and to the Adjustment Board, incorporated the proceedings thereon before the Board as exhibits to defendants' amended answer, asserted that such proceedings show that petitioner's claim to return to the job was considered by the Board on its merits and that the Board's decision was based upon petitioner's prior claim of disability and his payment therefor, in essence estoppel, and that petitioner was likewise estopped in his suit against respondents. (Tr. 21-25.)

Respondents filed a motion for summary judgment (Tr. 71-73), which was granted in the trial court on March 31, 1966. (Tr. 81-82.) Petitioner filed nothing in response to the motion for summary judgment. (Petition, p. 18.)

On appeal to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, the judgment of the trial court was affirmed. The Court of Civil Appeals held unanimously the evidence conclusively showed that, irrespective of any misfeasance or nonfeasance on the part of the respondents, petitioner was estopped as a matter of law to claim his right to re-employment in that petitioner's claim against the railroad for re-employment was barred by estoppel and thereby his claim for damages against respondents for misfeasance and nonfeasance in the prosecution of his claim would likewise be barred for the same reason. The test applied by the court was that

the respondents would be required to conclusively show "(1) that appellant [petitioner] would not have been successful even though the claim had been properly prosecuted or (2) that neither the alleged acts of misfeasance or nonfeasance proximately caused the adverse ruling or loss of his claim." (Petition, p. 21.) Based on the enunciated test, the court's holding was as follows:

> "In view of the law pronounced by the foregoing authorities, we have concluded that the evidence offered by the appellees in support of their motion for summary judgment is sufficient to establish the defense of estoppel and thereby defeat appellant's claim for damages. As we view it, the evidence conclusively shows that irrespective of any misfeasance or nonfeasance on the part of the appellees, appellant was estopped as a matter of law to claim his right to re-employment. The defense of estoppel having thus been shown to exist as a matter of law, the question of whether appellees were guilty of misfeasance or nonfeasance becomes immaterial. Since appellant's claim against the railroad for re-employment was barred by estoppel, his claim for damages against appellees for misfeasance and nonfeasance in the prosecution of his claim would likewise be barred for the same reason. That is to say, appellant having alleged and proved in a former judicial proceeding in this state that he was totally and permanently disabled, he will not now be heard to say in this suit that he was not totally and permanently disabled for the purpose of establishing a cause of action against appellees for misfeasance or nonfeasance in presenting his claim before the NRAB. As we view it, the evidence was sufficient to establish facts which, if proven at the trial, would establish the defense of estoppel and thus entitle appellees to an instructed verdict." (Petition, pp. 23-24.)

In the course of its opinion, the Court of Civil Appeals referred to petitioner's contention, while recognizing

the rule of estoppel, that there was raised by the pleadings a sufficient fact issue upon the question of whether respondents properly presented the matter to the Board. The court said:

> "[Petitioner] seems to take the position that appellees should have in some manner convinced the board that estoppel was not applicable because his previous suit against the railroad was not in fact or in law a suit for total and permanent disability nor was the judgment large enough to show that he is being compensated for total and permanent disability. All proceedings in that suit were before the board, and based upon those proceedings, the board concluded that the facts sustained the railroad's defense of estoppel. The very same evidence is now presented to us for the purpose of showing that appellant's claim before the NRAB could not have been successfully prosecuted despite the conduct of appellees because of the legal barrier of estoppel. It is also presented to us for the purpose of proving the defense of estoppel in appellant's claim for damages." (Petition, p. 23.)

REASONS FOR DENYING THE WRIT.

This case involves no important or novel question of law but only the question whether the Court of Civil Appeals correctly assessed the record made on a motion for summary judgment in a state court action for damages resulting from alleged misfeasance or nonfeasance of a union representative in handling a claim of an individual's right to return to work with a railroad. The Court of Civil Appeals held that since successful prosecution of the claim was impossible, the union's conduct in presenting the employee's fruitless claim before the National Railroad Adjustment Board could not, as a matter of law, have been a causal factor in the adverse ruling of the Board, and therefore respondents' conduct was not a cause in fact of any damages suffered by him.

Whether the Court of Civil Appeals was right in that decision—and it clearly was—is not a question that deserves review by this Court.

Contrary to petitioner's assertions, the decision below is not in conflict with any decision of this Court and presents no question under the Railway Labor Act, § 301 of the Labor-Management Relations Act, or the Federal Employers Liability Act which merits this Court's review. In fact § 301 of the LMRA is totally inapplicable in this proceeding and was never raised by petitioner at any point in the state court proceedings. The provisions of the Federal Employers Liability Act are neither involved directly nor indirectly in this proceeding. The only context in which FELA arises is the fact that petitioner brought a previous action against his employer railroad for personal injuries suffered while in the course of his employment, which action was brought under the Federal Employers Liability Act. And the Adjustment Board with a neutral referee found that, having gained judgment against the carrier for permanent incapability to perform work as a locomotive engineer, petitioner could not later assert in the grievance and arbitration proceedings that he was capable of resuming work as a locomotive engineer for the same railroad.

Petitioner now apparently asserts his right to review "arises out of alleged misfeasance in the handling of a grievance under the provisions of Sec. 153, Title 45, U. S. Code * * *." (Petition, p. 2.) As stated, petitioner is not asserting any violation of Section 3 or any other section of the Railway Labor Act. The quotation merely refers to the fact that the grievance was handled by the union under the provisions of Section 3 of the Railway Labor Act. As the petitioner's original petition (Tr. 2-10) indicates and as the Court of Civil Appeals states (Petition, p. 20), this proceeding involves a cause of action in tort for damages

resulting from misfeasance or nonfeasance of petitioner's union representatives in handling his claim of a right to return to work for the railroad.

The decision below is in accord with those decisions enunciating the statutory duty of fair representation. *Steele v. Louisville & N. RR.*, 323 U. S. 192 (1944). Under that doctrine, respondents were obligated to progress petitioner's claim in good faith and honesty and without hostility, discrimination or arbitrary conduct. *Humphrey v. Moore,* 375 U. S. 335 (1963). The facts clearly show that respondents did do so throughout the grievance procedures, did do so in submitting and handling the claim before the Adjustment Board, and did do so in requesting further interpretation by that Board.

However, rather than rendering a decision on the claim under the provisons of the applicable collective bargaining agreement, the Board, through a neutral referee, held petitioner was estopped from asserting his ability to return to work based upon the judgment in his previous personal injury suit, which the Board found was based on petitioner's permanent inability to work. As the record establishes and the Court of Civil Appeals found thereon, all the proceedings in the prior personal injury suit were before the Board and the issue of estoppel was thoroughly litigated by it. In fact, the matter was the subject of a vehement dissent by the employee members.

There was nothing further that respondents could have done to have altered the Board's decision. Petitioner cannot, and does not, point to any bad faith or arbitrary conduct of respondents which caused the Board to take this position, or to any good faith actions respondents could have taken, but did not, which would have made the Board reach a different result. At most, petitioner asserts that in some cases the Board has not applied the doctrine. But it is equally true that, in others, the Board,

with a different neutral, has applied estoppel on similar facts. (Tr. 68-70.)

Petitioner now seeks in this action to relitigate the holding of the Board on the same grounds raised and argued by respondents in that very proceeding, which arguments were rejected by the arbitrator, even though the findings of the Board contained in its award are final and binding. *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U. S. 257 (1965). There is, therefore, a critical difference between this case and *Humphrey v. Moore*, 375 U. S. 335 (1963). In the latter, the grievance was adjusted prior to arbitration. As one commentator has stated: "Had the matter gone to arbitration with the same result, any such review by the courts of the arbitrator's decision on the merits and his authority to act could not have been tolerated." Van Zile, *The Componential Structure of Labor-Management Contractual Relationships; Republic Steel Corp. v. Maddox* and *Humphrey v. Moore*, 43 U. DET. L. J. 334-5 (1966).

The Texas Court of Civil Appeals found that the Board, with everything before it, had applied the doctrine of estoppel. Therefore, the Court correctly held that, regardless of any action or inaction of respondents, the claim could not have been successfully prosecuted under the arbitrator's application of estoppel to the petitioner's claim. On this basis, the court would not allow petitioner to collaterally attack that decision in this case.

If petitioner were permitted to have a trial de novo, so to speak, with respect to the Board's findings, a union would be subject to suit for refusing to handle a grievance, no matter what the merits, and also subject to suit for malpractice relative to arbitration because the arbitrator, in disagreement with petitioner's views, found against the claim. Petitioner, though admitting his contentions were

presented to the Board (Gibson Dep. p. 121), is apparently seeking to make the union an insurer of the success of arbitration. Thus, it becomes apparent that there must be some finality in these matters. This Court has indicated that the employee does not have an absolute right to have his grievance taken to arbitration and that a union may at some point end the handling of frivolous grievances. See *Vaca v. Sipes,* 386 U. S. 171 (1967). Recognizing this, it assuredly follows that a union cannot be held liable relative to a claim found fruitless by the arbitrator.

The petitioner's claim that the Texas Court of Civil Appeals' decision conflicts with *Vaca v. Sipes, supra,* is unavailing. That case, unlike this one, involved a refusal by the union to submit the grievance to arbitration. In the employee's suit for breach of the duty of fair representation, the state courts awarded him damages on a finding that the grievance was meritorious. There was no evidence that the union breached its statutory duty by failing to press the grievance as a result of arbitrary or bad faith conduct. Because the holding of *Vaca v. Sipes, supra,* is that the refusal of the union to progress a meritorious grievance did not, as a matter of law, constitute the breach of the statutory duty, that case does not assist petitioner.

If the decision is pertinent here, it simply establishes that the Court of Civil Appeals made a correct determination. To establish compensable liability upon the union, there must be findings that (1) the claim is meritorious; (2) the union must have breached its duty through arbitrary, hostile and bad faith conduct; and (3), to establish damages, the union's conduct was the cause of the employee's loss. The Court of Civil Appeals stated that the respondents were "required to conclusively show (1) that appellant [petitioner] would not have been successful even though the claim had been properly prosecuted or

(2) that neither the alleged acts of misfeasance or nonfeasance proximately caused the adverse ruling or loss of his claim." (Petition, p. 21.) Petitioner cannot, and in fact does not, complain of the test applied by the court based on petitioner's alleged acts of negligence, because said test would appear to be less stringent as to his cause than the standards pronounced by this Court. To the extent possibly relevant herein, the Court of Civil Appeals did follow those requirements. In the instant case, the court found that, despite any alleged conduct of respondents, petitioner's claim could not have been successfully prosecuted before the Board in view of its application of the doctrine of estoppel.

Petitioner further claims that the references by the court below to *Jones v. Central of Georgia Ry. Co.*, 331 Fed. 649 (5th Cir. 1964) and *Hodges v. Atlantic Coast Line R. Co.*, 363 F. 2d 534 (5th Cir. 1966), establish a reluctance by that court to allow petitioner "a right to sue his union" although "the *Vaca* case recognizes that right." (Petition, p. 9.) This assertion is based on an erroneous view of what the Court of Civil Appeals decided in this case. In combination with the court's reference to the recognition of the principle of collateral estoppel in that state's law, it would appear that the court is saying that the doctrine was appropriately applied by the Board and that respondent is estopped from asserting "a claim for damages based upon an alleged substantive right which did not exist." (Petition, p. 25.) Further, the court is showing through these decisions that, if the claim had been sustained by the Board on October 31, 1963, it could not have been enforced in a Section 3, First (p) suit due to the defense of estoppel, which had been applied under similar facts by the United States Court of Appeals for the same circuit in which the instant action was brought. *Jones v.*

Central of Georgia Ry. Co., supra. That ruling was in accord with a long line of decisions by the lower federal courts as shown in the supporting opinion of the carrier members of the Board. (Tr. 66.) Subsequently, this Court in *Gunther v. San Diego & Arizona Eastern Ry., supra,* held that the findings in the Board's awards are final and binding on the railroad as well as the employee receiving an adverse decision. Thus, in *Hodges v. Atlantic Coast Line R. Co., supra,* the Court of Appeals for the Fifth Circuit held in a case somewhat like *Jones, supra,* that the Board's award was final and binding. That court, nevertheless, went on to admonish the Board in regard to the principle of estoppel by stating:

> "It does seem to us that at some point in the [Board] procedure the matter of estoppel should have been considered and a decision rendered with respect to it." *Id.* at 539.

In the instant case, the Board did consider the matter of estoppel, held it was a valid defense to the claim, and issued its award on that basis.

Thus, whether the Board applied the doctrine or whether the doctrine would be applied by the courts in a breach of duty suit is unimportant, for a union that takes a claim to the Board should not be subjected to possible liability because the Board saw fit to apply the principle in denying the claim. As the Court of Civil Appeals appropriately held, the application of the estoppel doctrine by the Board shows that the claim could not have been successfully sustained and further that the defense of estoppel would have negated petitioner's cause for damages in this suit. This determination raises no issue which warrants review by this Court. It involves a unique factual situation, fully canvassed by the court below and not

likely to ever again arise.[1] Whether or not decided correctly—and respondents believe it was—the question is not one meriting this Court's attention.

CONCLUSION.

For the foregoing reasons the Petition should be denied.

HAROLD A. ROSS,
ROSS & KRAUSHAAR,
730 Standard Building,
Cleveland, Ohio 44113,

HENRY H. ROGERS,
GARRISON, RENFROW, ZELESKEY,
CORNELIUS & ROGERS,
Post Office Drawer 1448,
Lufkin, Texas 75901,
Attorneys for Respondent.

---

[1] In this respect, it may be noted that the 1966 amendments to Section 3 of the Railway Labor Act incorporate a new subsection (q) by which an employee, aggrieved by the failure of the Board to make an award or by any of the terms of an award "may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review of the division's order." (45 U. S. C. § 153, First; 44 Stat. 578; 48 Stat. 1189; 80 Stat. 208, 209.)